

No. 44157-8-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

BALDEMAR LAZARO, JR.,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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5D Karl B. Tegland, Washington Practice: Courtroom Handbook on
Washington Evidence, § 404(b), (1) at 245 (2012-2013)6

I. ISSUES

- A. Did the trial court improperly admit ER 404(b) evidence regarding Lazaro's gang affiliation?
- B. Was Lazaro's attorney ineffective in his representation of Lazaro for failing to offer a limiting instruction regarding the ER 404(b) evidence regarding gang affiliation?

II. STATEMENT OF THE CASE

In August 2011 Baldemar Lazaro, Jr.¹ and Braulio Mora were residents at Green Hill School (Green Hill), a juvenile institution for young males who are 15 to 21 years of age located in Chehalis, Washington. RP² 17-20. Lazaro and Mr. Mora are affiliated with rival gangs. RP 22-23. Lazaro is affiliated with a Hispanic gang known as the Norteños. RP 22. Mr. Mora is affiliated with a Hispanic gang known as the Sureños. RP 23.

Richard Hughes is a juvenile rehabilitation residential counselor (JRRC) at Green Hill. RP 16. Mr. Hughes has been a JRRC for over 21 years. RP 16. Mr. Hughes first met Lazaro and Mr. Mora when Mr. Hughes was transferred to Green Hill from Maple Lane School on July 3, 2011. RP 20. Mr. Hughes is familiar with Lazaro and Mr. Mora's gang affiliations. RP 22-23. It is important for staff to be knowledgeable about the gang affiliations

¹ Hereafter, Lazaro.

² There are four verbatim report of proceedings. The State will refer to the jury trial volume (8-9-12 and 8-10-12) as RP. The other report of proceedings will be cited as RP with the date in parenthesis.

because it is a safety and security issue for the staff and residents.
RP 23.

On August 24, 2011 Mr. Hughes took six residents, including Lazaro and Mr. Mora out to an outside enclosure (yard) for some recreational time. RP 24-26. When the group walked outside Lazaro and Mr. Mora immediately walked across the yard, away from the others, and began fighting. RP 28. There were two other rival gang members of Lazaro in the yard. RP 29. Mr. Hughes immediately directed Lazaro and Mr. Mora to stop fighting, which both men ignored. RP 29. The fighting, in the beginning, was mutual. RP 30. Mr. Hughes was also directing the other residents to sit down and not engage in the fighting. RP 29. Mr. Hughes was concerned because there were two other rivals of Lazaro in the group and he did not want them to become involved in the fight. RP 29, 48-49. Mr. Hughes called for assistance and other employees at Green Hill received a "Code 2", which means all area staff are to respond quickly to the area. RP 53.

Approximately 10 to 15 seconds into the fight Lazaro got the upper hand and knocked Mr. Mora to the ground. RP 29, 48. In this position Mr. Mora was not able to defend himself. RP 30. Once Mr. Mora was knocked to the ground Lazaro proceeded to punch Mr.

Mora about the head and face nonstop until Mr. Hughes pulled Lazaro off of Mr. Mora. RP 30-31.

Mr. Hughes observed that the two rival gang members looked like they were going to get up and engage in the fight. RP 29. Mr. Hughes released Lazaro so he could direct the two residents to stay where they were. RP 30. Once released, Lazaro kicked Mr. Mora in the face, which caused Mr. Mora to fall backwards onto his back. RP 30, 33, 35. Lazaro, who was in a standing position, then proceeded to strike Mr. Mora eight to 10 more times. RP 35. Mr. Mora was not striking back. RP 57-58.

Rick Coward, a security officer at Green Hill, responded to the yard to assist Mr. Hughes. RP 52-55. Mr. Hughes grabbed Lazaro and Mr. Coward grabbed Mr. Mora. RP 55. Mr. Mora was bleeding heavily out of his nose and mouth. RP 60. The bleeding concerned Mr. Coward enough to make sure Mr. Mora maintained his airway. RP 57. Lazaro was checked out by the nurse at Green Hill and he did not have any remarkable or significant injuries. RP 37. Mr. Mora was transported to Providence Centralia Hospital for treatment for his injuries. RP 37, 59.

At Providence Centralia Hospital Mr. Mora was evaluated by Dr. Paula Godfrey. RP 68-69. A CT scan of Mr. Mora's head showed multiple fractures around his left eye. RP 71. Dr. Godfrey

diagnosed a tripod fracture due to there being three bones in the lower part of the eye socket broken. RP 71. Dr. Godfrey also observed a fracture of the outer wall of outside portion of the left eye bone. RP 71.

On April 17, 2012 the State charged Lazaro with one count of Assault in the Second Degree stemming from the August 24, 2011 fight with Mr. Mora. CP 1-3. Lazaro elected to have his case tried to a jury. See RP. Prior to the start of trial Lazaro's attorney made a motion in limine to exclude any mention that Lazaro was in a gang or that the assault was a gang-related offense. RP 3. The State argued that the evidence was relevant under ER 401 and permissible under ER 404(b) to show motive, intent, and plan. RP 5. The State further argued that it should be allowed to at a minimum be able to explain the entire story, including gang culture and reluctance to testify. RP 5-6. The trial court ruled that it would allow the testimony if the State could lay the proper foundation because it was admissible under ER 404(b) for motive. RP 6-7.

The State called the victim, Mr. Mora to testify. RP 12. Mr. Mora refused to take the oath, let alone testify. RP 12-13. Mr. Mora informed the trial court, "I don't want to say anything, and I don't want to charge anybody with anything." RP 13. This statement and behavior was witnessed by the jury. RP 11-13. The State

proceeded with its' case without Mr. Mora. RP 14-15. Ultimately Lazaro was found guilty as charged. RP 137; CP 61. Lazaro timely appeals his conviction. CP 107-16.

The State will further supplement the facts as needed throughout its argument.

III. ARGUMENT

A. THE TRIAL COURT PROPERLY ADMITTED THE ER 404(b) EVIDENCE REGARDING LAZARO'S GANG AFFILIATION.

Lazaro argues the evidence of his and Mr. Mora's alleged gang affiliation was inadmissible ER 404(b) evidence because the State did not present evidence that the assault was connected to gang activity and therefore the evidence was used to show Lazaro had a propensity to commit crimes. RP 5, 8-9. The gang affiliation was sought to be admitted for the purposes of showing motive and under the res gestae exception, to give a complete story of the crime. RP 5-7. The trial court properly allowed the State to admit evidence of gang affiliation under these exceptions.

1. Standard Of Review.

Admissibility of evidence determinations by the trial court are reviewed under an abuse of discretion standard. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999) (citations omitted). "A trial court abuses its discretion only when its decision is manifestly

unreasonable or is based on untenable reasons or grounds.” *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003), *citing State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). If the trial court’s evidentiary ruling is erroneous, the reviewing court must determine if the erroneous ruling was prejudicial. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An error is prejudicial if “within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *Bourgeois*, 133 Wn.2d at 403 (citations omitted).

2. The Trial Court Properly Admitted The 404(b) Evidence Regarding Lazaro and Mr. Mora’s Gang Affiliations.

A party may not admit evidence of other crimes, wrongs, or acts of a person to show action in conformity therewith. *State v. Yarbrough*, 151 Wn. App. 66, 81, 210 P.3d 1029 (2009). The purpose and scope of ER 404(b) is that it “governs the admissibility of evidence of other crimes or misconduct for purposes other than proof of general character.” 5D Karl B. Tegland, *Washington Practice: Courtroom Handbook on Washington Evidence*, § 404(b), (1) at 245 (2012-2013). Evidence of other crimes, acts, or wrongs by a person may be admissible for purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or

absence of mistake or accident. ER 404(b). “Gang evidence falls within the scope of ER 404(b).” *Yarbrough*, 151 Wn. App. at 81.

Prior to admitting ER 404(b) evidence a trial court must conduct a four part test. *Id.* at 81-82. The trial court must,

(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.

Id. at 81-82. It is also necessary to establish a nexus between the gang and the crime before the evidence may be deemed relevant.

State v. Embry, 171 Wn. App. 714, 732, 287 P.3d 648 (2012). Trial courts may admit evidence of gang affiliation to establish the motive for the crime and the State is permitted to establish motive even when motive is not an element of the crime charged. *Embry*, 171 Wn. App. at 732; *Yarbrough*, 151 Wn. App. at 83.

a. The trial court properly admitted the ER 404(b) evidence under the exception to prove motive.

The trial court properly admitted evidence regarding Lazaro and Mr. Mora’s gang affiliation under the exception to prove motive. To prove Lazaro committed the crime of Assault in the Second Degree the State was required to show that Lazaro intentionally assaulted Mr. Mora recklessly inflicting substantial bodily harm on Mr. Mora. RCW 9A.36.021(1)(a); WPIC 35.13; CP 50. The mens

rea involved in this charge is two-fold, first, the State has to prove there was an intentional assault, and second, the State must prove Lazaro acted recklessly when he inflicted the substantial bodily harm. RCW 9A.36.021(1)(a); WPIC 35.13; WPIC 10.01; WPIC 10.03. To show intent the State must prove Lazaro acted with the objective or purpose to accomplished a result which constituted a crime. WPIC 10.01. To show Lazaro acted recklessly the State must prove Lazaro knew of and disregarded a substantial risk that the wrongful act might occur and Lazaro's disregard was a gross deviation from conduct that a reasonable person would have exercised in the same situation. WPIC 10.03. Motive and intent are not synonymous. *Yarbrough*, 151 Wn. App. at 84. Intent is the mens rea which the criminal act is committed while "[m]otive is the inducement which tempts a mind to commit a crime." *Id.* (internal quotations and citations omitted).

Lazaro's trial counsel argued that the evidence of gang affiliation was weak and the evidence was unfairly prejudicial to Lazaro as it would make the jury more inclined to convict Lazaro based on propensity to commit crimes. RP 4. The State argued the evidence was admissible to show motive and res gestae, including the complications with getting witnesses or victims to cooperate in

the prosecution of these types of cases. RP 5-6. The trial court ruled:

I'm not going to exclude it. I will allow it, of course, subject to laying an appropriate foundation. "Motive" is specifically mentioned in Rule 404(b) as being allowable - - prior conducts - - acts of prior conducts or gang affiliation, I would say, would be that to show motive. And I know motive is not an element, but it's part of the story, and I am going to allow the State to do it.

RP 6-7. The trial court's ruling specifically dealt with one through three of the four part test for admitting ER 404(b) evidence. *Yarbrough*, 151 Wn. App. at 81. While the trial court did not use the magic words "probative value outweighs the prejudicial effect" given trial counsel's argument and the qualifier that the State must lay the proper foundation (the first part of the test) the trial court considered this factor and ruled in the State's favor to admit the evidence. See *Id.*; RP 6-7.

In *Yarbrough* this Court ruled that the evidence of gang affiliation was relevant to establish why Yarbrough was induced to act with extreme indifference when he shot the victim, whom he perceived to be a member of a rival gang. *Yarbrough*, 151 Wn. App. at 84. This Court also ruled that the evidence was highly probative of the State's theory of the case and it showed the context in which the crime was committed. *Id.* In regards to intent

this Court “recognized that evidence of intent ... is to be gathered from *all* of the circumstances of the case, including not only the manner and act of inflicting the wound, but also *the nature of the prior relationship and any previous threats.*” *Id.* at 86-87 (internal quotations and citations omitted, emphasis original). While the jury cannot presume specific intent, intent “can be inferred as a logical probability from all the facts and circumstances.” *Id.* at 87.

Mr. Hughes explained to the jury how he was informed that Lazaro and Mr. Mora were rival gang members and how the information concerning gang affiliation is obtained and maintained within Green Hill. RP 21-23. This was a sufficient foundation for the State to show by a preponderance of the evidence that Mr. Mora and Lazaro were affiliated with rival gangs. *Id.* at 81-82. The motive for the fight between Lazaro and Mr. Mora was their rival gang affiliations. RP 21-25, 28-29, 50-51, 83. Even though Mr. Mora refused to testify, the evidence showed he and Lazaro were rival gang members, that the fight was premeditated, both parties actively engaged in the fight at the beginning, and Mr. Hughes observed the two other rival gang members of Lazaro appeared as though they were going to engage in the fight were sufficient circumstantial evidence to show the required nexus between the

assault and Lazaro and Mr. Mora's gang affiliation. *Embry*, 171 Wn. App. at 732; RP 22-23, 28-29, 48-49.

The ER 404(b) gang affiliation evidence was relevant to establish why Lazaro was induced to intentionally assault Mr. Mora and recklessly inflict substantial bodily harm upon Mr. Mora. The trial court's admittance of the ER 404(b) evidence under the motive exception was permissible. Lazaro cannot show that the trial court abused its discretion. The ruling by the trial court was not based on untenable reasons or grounds and was not manifestly unreasonable due to the evidence presented, motive, and the State's theory of the case. See *C.J.*, 148 Wn.2d at 686. This Court should affirm Lazaro's conviction.

b. The trial court properly admitted the 404(b) evidence under the res gestae exception.

Evidence of misconduct or other crimes is admissible when it completes the crime story under the res gestae exception. *State v. Hughes*, 118 Wn. App. 713, 725, 77 P.3d 681 (2003) *citing State v. Brown*, 132 Wn.2d 529, 571, 940 P.2d 546 (1997). "Where another offense constitutes a "link in the chain" of an unbroken sequence of events surrounding the charged offense, evidence of that offense is admissible in order that a complete picture be depicted for the jury." *Hughes*, 118 Wn. App. at 725 (citations and internal quotations

omitted). Even when a court does not fully articulate the balance of the probative value versus the prejudicial value of the evidence on the record the court's record can provide adequate reasoning that satisfies this requirement. *Id.* (citations omitted).

In *Hughes* the State argued that the uncharged burglary and weapons charges were part of the same transaction as the charged crime and therefore admissible under the res gestae exception. *Id.*, footnote 8. Hughes argued that the evidence was prejudicial and irrelevant. The Court of Appeals noted that the record reflected that the trial court adopted the State's argument, which was sufficient. *Id.*

In *State v. Boot* there was a motion in limine filed by Mr. Boot to exclude ER 404(b) evidence including his alleged gang affiliations. *State v. Boot*, 89 Wn. App. 780, 787, 950 P.2d 964 (1998). The trial court held a hearing and ruled the gang evidence was admissible to prove motive, premeditation and under the res gestae exception to ER 404(b). *Boot*, 89 Wn. App. at 788. Regarding the res gestae exception the Court of Appeals acknowledged that each piece of evidence was probative to show the escalating events and series of crimes committed. *Id.* at 790. The evidence allowed the jury to see an entire picture and attempt to make some sense out of what seemed like a senseless crime. *Id.*

The Court of Appeals affirmed the trial court's ruling and held it correctly relied upon all three exceptions and there was no abuse of discretion. *Id.* at 790-91.

The deputy prosecutor articulated for the trial court that the State sought to admit the gang affiliation evidence to "explain the entire story." The trial court granted the State's motion, and as argued above, articulated the first three factors required in the test to admit ER 404(b) evidence. As stated above, the trial court did not use the magic words, probative value outweighs the prejudicial effect, but that was considered when the trial court made its ruling.

The State needed to explain to the jury why these two men would enter the yard, immediately walk to a location away from the others and begin fighting. The ER 404(b) evidence explained why Mr. Mora refused to take the oath and testify against Lazaro. RP 13, 22-23, 50-51. Further the evidence admitted described that if you are a gang member and a rival wants to fight you, you must fight or your own gang will attack you and make you pay for not putting in the work necessary as part of the gang. RP 83. The evidence also explained why Mr. Mora acted like the fight was no big deal. RP 81-82.

The trial court did not abuse its discretion by allowing the ER 404(b) evidence in under the res gestae exception and this Court should affirm Lazaro's conviction.

c. If the trial court erred in admitting the ER 404(b) evidence Lazaro cannot show prejudice.

The State maintains the trial court did not err when it admitted the ER 404(b) evidence, arguendo, if the trial court did err, Lazaro does not make the requisite showing that he was prejudiced by the wrongfully admitted evidence. Lazaro must show that, within reasonable probabilities, he would not have been convicted of Assault in the Second Degree if the trial court had not admitted the erroneous ER 404(b) evidence. Lazaro cannot meet this burden.

The evidence that Lazaro committed Assault in the Second Degree was overwhelming. Take away the gang affiliation evidence, the jury would be left with a mutual fight, that within 10 to 15 seconds turned into a one sided beating. RP 29-31, 33, 35, 48, 57-58. After being knocked to the ground Mr. Mora was no longer able to defend himself, let alone fight, yet Lazaro continually hit Mr. Mora in the head with his fists. RP 30-31. Mr. Hughes physically restrained Lazaro to stop him from beating Mr. Mora, yet once released, Lazaro turned back on Mr. Mora and kicked Mr. Mora in the head. RP 29-30, 33. Once kicked, Mr. Mora was knocked down

on his back and Lazaro continued beating Mr. Mora by punching him repeatedly from a standing position. 57-58. Mr. Mora suffered from four fractured bones in his face as a result of the beating from Lazaro. RP 37-38, 71-72. Also as a result of his injuries, Mr. Mora was unable to speak at any length and was on a liquid diet, unable to eat solid foods. RP 39-40.

The overwhelming evidence proved Lazaro intentionally assaulted Mr. Mora, recklessly inflicted substantial bodily harm upon Mr. Mora. See WPIC 2.03.01. Lazaro cannot show he was prejudiced by the trial court's erroneous ER 404(b) ruling and his conviction should therefore be affirmed.

B. LAZARO RECEIVED EFFECTIVE ASSISTANCE FROM HIS ATTORNEY THROUGHOUT THE TRIAL PROCEEDINGS.

Lazaro's attorney provided competent and effective legal counsel throughout the course of his representation. Lazaro asserts his attorney was ineffective for failing to propose a limiting instruction directing the jury to disregard the propensity aspect of the gang affiliation evidence. Brief of Appellant 10-12; See CP 32-42.

Lazaro's assertion that his attorney was ineffective is false. If this Court were to find Lazaro's attorney's performance was

deficient, Lazaro cannot show he was prejudiced by his attorney's conduct and his ineffective assistance claim therefore fails.

1. Standard Of Review.

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and extrinsic evidence outside the trial record will not be considered. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citations omitted).

2. Lazaro's Attorney Was Not Ineffective During His Representation Of Lazaro Throughout The Jury Trial.

To prevail on an ineffective assistance of counsel claim Lazaro must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, citing *State v. McFarland*, 127 Wn.2d at 335. Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient

basis to rebut the presumption that an attorney's conduct is not deficient "where there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130.

If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice "requires 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Horton*, 116 Wn. App. at 921-22, *citing Strickland v. Washington*, 466 U.S. at 694.

In a trial setting, if an attorney's conduct can be characterized as legitimate tactics or trial strategy the attorney's performance is not deficient. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). If an attorney's actions are trial tactics or the theory of the case the reviewing court will not find ineffective assistance of counsel. *Grier*, 171 Wn.2d at 33. An attorney's "failure to request a limiting instruction for evidence under ER 404(b) may be a legitimate tactical decision not to reemphasize damaging evidence." *Yarbrough*, 151 Wn. App. at 90. A "defendant can rebut the presumption of reasonableness by demonstrating that there is no conceivable legitimate tactic explaining counsel's performance." *Grier*, 171 Wn.2d at 33 (internal quotations and citations omitted).

Although Lazaro's trial counsel did originally object to the introduction of evidence regarding Lazaro's gang affiliation, he later used the evidence to promote his theory of the case and argue why Lazaro should not be found guilty. RP 3-7, 21-22, 48-51, 83, 120, 125-26. Lazaro's attorney elicited the following exchange with Mr. Hughes:

Q. You talked about this gang situation over at Green and I wanted to know, what happens if somebody wants to fight and you don't fight?

A. If a rival wants to fight you - -

Q. Yes.

A. - - and you don't fight, then your own gang will attack you and make you pay for not putting in work.

Q. Is that pretty common?

A. It's not uncommon. It doesn't happen on a regular basis, but it does happen.

Q. So you are going to get it worse if you don't fight?

A. The potential is there.

RP 82-83. Lazaro's attorney also elicited the following testimony from Mr. Coward regarding Mr. Mora's demeanor regarding the fight:

To him, it was no big deal. I mean, yeah. It's part of the gang life. It's just - - you take the lumps, I guess, is what I am saying, you know. The outcome is, you know, pain, I guess, and you just soak it up is what I am trying to say.

RP 81. Later during closing arguments, Lazaro's attorney stated Lazaro and Mr. Mora were in rival gangs. RP 120. Lazaro's attorney then argued to the jury the following when discussing the necessary proof for Assault in the Second Degree:

It's not just, did he [Lazaro] assault him [Mr. Mora]. It's did he assault him intentionally and we recklessly inflict the substantial bodily injury. And that's an important point to make. We don't have that here. What we have is a situation where apparently a couple of guys in gangs, lots of fighting between these two gangs, and they got into a fistfight, and Mr. Mora lost. But that doesn't represent an intentional assault, and it doesn't represent a reckless infliction of substantial bodily injury.

Because given the fact that a reasonable person in that circumstance would have fought back because what would have happened to him had he not fought back? Well, a couple things: Mr. Mora would have beat him up and then possibly he would have gotten beaten up by his own gang because there was testimony by Mr. Hughes that they would retaliate against him...

But in these circumstances where two guys square off and start swinging hard at each other and one of them loses and suffers some injury, it is not appropriate to convict the other person who got into the fight for the reasons I have stated.

RP 125-26. The theory of Lazaro's case appeared to be that this was a mutual fight between two rival gang members, Lazaro did not have an option not to fight because of potential recourse by his own gang (duress), and under these circumstances Lazaro should not

be found guilty. Lazaro's attorney made a tactical decision to use the ER 404(b) evidence regarding Lazaro and Mr. Mora's gang affiliation to explain why Lazaro was not culpable, and therefore not guilty of Assault in the Second Degree. It was also a tactical decision to not propose the limiting instruction because Lazaro's attorney did not want that limitation.

Lazaro received effective assistance from his attorney and his conviction should be affirmed.

3. If Lazaro's Attorney Is Found To Be Deficient, Lazaro Has Not Met His Burden To Show That He Was Prejudiced By The Deficient Performance Of His Attorney.

The State maintains that Lazaro's attorney's performance was not deficient, *arguendo*, if this Court were to find Lazaro's attorney's performance deficient; Lazaro has not met his burden to show he was prejudiced. Lazaro must show that, but for his attorney's error for failing to request a limiting instruction regarding the ER 404(b) evidence of gang affiliation, the jury would not have found Lazaro not guilty. *See Horton*, 116 Wn. App. at 921-22.

As argued above, Lazaro was not prejudiced by the ER 404(b) evidence regarding his gang affiliation. Lazaro has not met his burden to show prejudice and this Court should affirm his conviction.

V. CONCLUSION

This Court should find that the trial court properly admitted the ER 404(b) evidence regarding Lazaro and Mr. Mora's gang affiliation. This Court should also find Lazaro's attorney was not ineffective for failing to request a limiting instruction regarding the ER 404(b) evidence. This Court should affirm Lazaro's conviction for Assault in the Second Degree.

RESPECTFULLY submitted this 2nd day of July, 2013.

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LEWIS COUNTY PROSECUTOR

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Hearing Date(s): ____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: ____

Comments:

No Comments were entered.

Sender Name: Teresa L Bryant - Email: **teri.bryant@lewiscountywa.gov**

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